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In the Supreme Court of the United States

No. [REDACTED]

10

OCTOBER TERM, 1963.

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie,
deceased,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
a. corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER.

JACK G. DAY,
BERNARD A. BERKMAN,
1748 Standard Building,
Cleveland 13, Ohio,
Counsel for Petitioners.

BERNARD A. BERKMAN,
Of Counsel.

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In the Supreme Court of the United States

No. 582.

OCTOBER TERM, 1963.

MABEL GILLESPIE,

Administratrix of the Estate of Daniel E. Gillespie,
deceased,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION,
a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (R. 29-50) is reported at 321 F. 2d 518 (6th Cir. 1963).

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit, affirming the order of the United States District Court for the Northern District of Ohio, Eastern Division, which struck from the petitioner's amended complaint all allegations relating to the general maritime law doctrine of unseaworthiness and the Ohio Wrongful Death Act, was entered on July 29, 1963 (R. 26).

Petition for a writ of certiorari was filed October 24, 1963 and was granted January 6, 1964. 375 U. S. 962 (1964).

The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

I. Whether suit for wrongful death of a deceased seaman may be maintained against his employer under the general maritime law doctrine of unseaworthiness and the state statute which provides a remedy for wrongful death, where the death occurred in state waters.

II. Whether the classes of beneficiaries named in the Jones Act are mutually exclusive, so that, in a wrongful death action, the existence of a person in one such class precludes recovery by persons in the other class.

III. Whether a claim for conscious pain and suffering against his employer survives the death of a seaman, where the period of pain and suffering for which compensation is claimed is short and immediately preceded his death by drowning.

STATUTES INVOLVED.

The statutes involved are Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. Section 688, incorporating the Federal Employers' Liability Act, 45 U. S. C. Section 51, the Ohio Wrongful Death Act, Ohio Revised Code Sections 2125.01 and 2125.02, and the Ohio Survival Statute, Ohio Revised Code Section 2305.21. They are reprinted in Appendix A, *infra*, at pp. 42-45.

STATEMENT OF THE CASE.

Petitioner, Mabel Gillespie, as administratrix of the estate of her deceased son, Daniel E. Gillespie, filed an amended complaint in the district court against the respondent, United States Steel Corporation, for damages arising out of the death of her decedent in Ohio waters while employed by the respondent as a seaman and a member of the crew of one of respondent's steamships, engaged in transportation as a cargo carrier on the Great Lakes (R. 1-6). Jurisdiction of the district court was invoked because the complaint raised questions under a law relating to admiralty and commerce, the Merchant Marine Act of 1920 (Jones Act), and the general federal maritime law. Petitioner's amended complaint sought recovery (1) for herself as dependent mother of the decedent, and for the benefit of her children, dependent sisters and brother of the decedent, for *wrongful death*, and (2) for the estate of the decedent for his *conscious pain and suffering* immediately prior to his death by drowning (R. 5). She sought recovery for *wrongful death* on the alternate grounds of (1) the Merchant Marine Act of 1920 (Jones Act), and (2) the general maritime law of unseaworthiness coupled with the Ohio Wrongful Death Act, and for decedent's *conscious pain and suffering* based upon the alternate theories of liability of (1) the survival provisions of the Merchant Marine Act of 1920 (Jones Act), and (2) the general maritime law of unseaworthiness coupled with the Ohio Survival Statute (R. 1-2).

Respondent filed a motion requesting the trial court to strike from the amended complaint all allegations relating to the general maritime doctrine of unseaworthiness, the Ohio Wrongful Death and Survival Statutes, and the dependent sisters and brother of the decedent as bene-

ficiaries (R. 6-14). The district court granted respondent's motion to strike in its entirety (R. 15-16).

Petitioner appealed from this order to the Sixth Circuit Court of Appeals (R. 16). Respondent filed a motion to dismiss the appeal on the ground that the order appealed from was not final and appealable (R. 17). Before the Court of Appeals heard the motion to dismiss, petitioner and the other named beneficiaries for whom she sued filed a petition for extraordinary relief in the event that the Court of Appeals should rule that the order of the district court from which appellate relief was sought was not final and appealable (R. 18-24). Both the appeal and the application for extraordinary relief were consolidated in the Court of Appeals (R. 24-25).

With the appellate proceedings in this posture, the Court of Appeals ruled as follows:

- (1) The court denied the respondent's motion to dismiss the appeal (R. 25).
- (2) The Court affirmed the order of the district court below on its merits (R. 26).
- (3) The court denied the petition for extraordinary relief (R. 28).

It is the affirmance on its merits of the district court order below by the Court of Appeals from which petitioner seeks relief in this Court.

SUMMARY OF ARGUMENT.

The pre-trial ruling on the pleadings by the district court below, affirmed by the Circuit Court of Appeals for the Sixth Circuit, has effectively barred from this case (1) the petitioner's claim for the wrongful death of her decedent, a seaman, against his employer upon the general maritime law theory of unseaworthiness and the Ohio Wrongful Death Act;¹ (2) certain designated dependent brother and sisters of the decedent as beneficiaries of the wrongful death claim;² and (3) petitioner's claim for decedent's conscious pain and suffering prior to his death upon the doctrine of unseaworthiness and the Ohio Survival Statute.³

Petitioner contends that each of these holdings of the court below is erroneous. She urges:

First, that the decision of this Court in *Lindgren v. United States*, 281 U. S. 38 (1930), which held that the Jones Act provides the exclusive remedy for death of a

¹ Upon the ground that the Jones Act, Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. § 688, provides the exclusive remedy for death of a seaman against his employer, and that therefore the unseaworthiness of the vessel, irrespective of negligence, is unavailable as an alternate basis of recovery for the seaman's death, even though such claim is predicated upon the wrongful death statute of the state in which the death-causing injury occurred, *Lindgren v. United States*, 281 U. S. 38 (1930), approved and followed.

² Upon the ground that the classes of beneficiaries named in the Jones Act are mutually exclusive, so that, in a wrongful death action governed by its provisions, the existence of a beneficiary in one such class precludes recovery by persons in the other class.

³ Upon the ground that a claim for conscious pain and suffering does not survive the death of a seaman where the period of pain and suffering for which compensation is claimed is short and immediately preceded his death by drowning, despite the fact that such claim is predicated upon the survival statute of the state, in which the death-causing injury occurred. *The Corsair*, 145 U. S. 335, 348 (1892), approved and followed.

seaman against his employer, was incorrectly decided at its inception, that subsequent case experience in contiguous areas has stripped *Lindgren* of any vitality it may have had at the outset, and that this case presents a long overdue opportunity for this Court to re-examine and discard an unjust, illogical and overly-harsh rule which too narrowly delineates the rights of survivors of a seaman whose death resulted from a maritime tort. She urges this Court to rule that, where death occurred in state waters, survivors of a seaman may bring suit for wrongful death against his employer upon the general maritime doctrine of unseaworthiness, notwithstanding the Jones Act remedy which may also be available to them.

Second, that the interpretation of the language of the Jones Act relating to beneficiaries which most nearly satisfies the beneficent purposes of the Act is that the classes of beneficiaries enumerated are *cumulative*, rather than *exclusive*; that, to the extent that *Chicago, B. & Q. R. Co. v. Wells-Dickey Trust Co.*, *Adm'r.*, 275 U. S. 161 (1927), has interpreted the Jones Act differently, it should be overruled; and that, in addition to their participation as beneficiaries of a wrongful death award based upon unseaworthiness and the Ohio wrongful death act (her first argument, *supra*), the beneficiaries excluded by the rulings of the courts below are entitled to participate as beneficiaries of a Jones Act wrongful death award.

Third, the clearly established principle that where a claim for conscious pain and suffering prior to death is based upon the survival statute of the state in which the tortious injury occurred, the survival provisions of the Jones Act and the state survival statute provide a valid basis for such a claim on the theories of both negligence

under the Jones Act and unseaworthiness under the general maritime law, *Holland v. Steag, Inc.*, 143 F. Supp. 203 (D. Mass. 1956), cited with approval in *Kernan v. American Dredging Co.*, 355 U. S. 426, 430, footnote 4 (1958), is applicable here despite the fact that the interval for which claim is made is of short duration and immediately preceded the death of the decedent by drowning.

ARGUMENT.

I.

WHERE THE DEATH OF A SEAMAN OCCURS IN STATE WATERS, SUIT FOR HIS WRONGFUL DEATH MAY BE MAINTAINED AGAINST HIS EMPLOYER UNDER THE GENERAL MARITIME LAW DOCTRINE OF UNSEAWORTHINESS AND THE STATE STATUTE WHICH PROVIDES A REMEDY FOR WRONGFUL DEATH.

The opinion of the Sixth Circuit Court of Appeals from which petitioner here seeks relief is based upon, and revitalizes, the position taken by this Court in *Lindgren v. United States*, 281 U. S. 38 (1930), that the Jones Act⁴ provides the exclusive remedy for death of a seaman against his employer and that therefore the unseaworthiness of the vessel, irrespective of negligence, is unavailable as an alternate basis for recovery for the seaman's death, even though such claim is predicated upon the wrongful death statute of the state in which the injury causing death occurred.

Upon such authority and reasoning, the court below affirmed the pre-trial pleading ruling made by the federal district court which struck from the amended complaint all allegations concerning the common law maritime doctrine of unseaworthiness, the Ohio wrongful death act as

⁴ Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. § 688.

it would remedially implement the unseaworthiness doctrine, and all beneficiaries who would participate in a death award under the provisions of the Ohio Wrongful Death Act, but not under the Jones Act.

Thus, the question of the continuing validity of *Lindgren v. United States, supra*, is squarely presented to this Court.⁵

The Court of Appeals noted with approval both of the arguments employed in the *Lindgren* opinion to support the rule that the Jones Act remedy for wrongful death of a seaman against his employer is "paramount and exclusive":⁶ (1) that the federal enactment of the Jones Act pre-empted the field of recovery from his employer of damages for a seaman's death,⁷ and (2) that the express language of the Jones Act, insofar as it provides for an election by an injured seaman between the theories of Jones Act negligence and unseaworthiness, but fails to mention any such election in the language describing his personal representative's claim for his death, clearly demonstrates that no alternative death remedy under the maritime law was intended by Congress.⁸

⁵ In response to the Petitioner's contention in the court below that the position taken in *Lindgren* on this point was unsound, and had been eroded by more recent decisions of this Court in contiguous areas, the Court of Appeals remarked:

"* * * if the prior rule is no longer accepted by the Supreme Court, and *Lindgren v. United States* * * * is to be overruled, the landmarks must be plainer to see; and it would be unbecoming for this Court to base its determination upon the assumption that the holding in *Lindgren* is to be reversed." (R. 46.) (Emphasis supplied.)

⁶ *Lindgren v. United States*, 281 U. S. 38, 46 (1930), quoting from *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 172 (1917).

⁷ *Lindgren v. United States*, 281 U. S. 38, 43-46 (1930). See Court of Appeals opinion (R. 48).

⁸ *Lindgren v. United States*, 281 U. S. 38, 47-48 (1930). See Court of Appeals opinion (R. 42).

The Court of Appeals then sought to implement its judgment that *Lindgren* effectively blocked an alternate unseaworthiness death remedy in this case by noting, as did the district court below⁸ that "all of the allegations of the complaint * * * constitute assertions of negligence," and that "[w]hether the negligence was failure to provide safe access to the ship for plaintiff's decedent, or whether the negligence was a breach of defendant's duty to provide a seaworthy ship, the action is based upon negligence and proximate cause * * *." (R. 48.) (Emphasis supplied.)

Petitioner contends that at its inception the rule¹⁰ in *Lindgren* was indefensible logically and that subsequent case experience has stripped *Lindgren* of any vitality it may have had, as to both the arguments which were advanced to support the result in that case: (1) federal pre-emption and (2) the interpretation of the statutory language "at his election" in the Jones Act; and that this

⁸ See Memorandum on Motion to Strike by Jones, J., in the federal district court:

"A reading of the complaint as to the facts and character of the suit spells 'Jones Act.' The incorporation of the additional legal provisions in the complaint gives no greater right or remedy than that furnished by the Jones Act." (R. 15.)

¹⁰ There has been some difference of opinion in the proceedings below as to whether the language in *Lindgren* asserting that, even where unseaworthiness is the gravamen of the claim, the Jones Act provides an exclusive remedy for the death of a seaman was a square holding or *obiter dictum*. See Mr. Justice Brennan's comment, concurring in part and dissenting in part in *The Tungus v. Skovgaard*, 358 U. S. 588, 606 (1959) and the rejoinder of the Court of Appeals (R. 44-45). Counsel for petitioner has learned enough in these proceedings to engage no further in this academic exercise, particularly before this Court. For here the determination of whether the *Lindgren* rule is controlling rests upon the *validity* of the rule, not its characterization as either *dictum* or *decision*. Petitioner's position is simply that, whatever the *Lindgren* rule is, it should be discarded.

case presents a long overdue opportunity to this Court to re-examine and discard an unjust, unwarranted and overly-harsh rule which too narrowly delineates the rights of survivors of a seaman whose death resulted from a maritime tort.

Further, petitioner urges that her amended complaint clearly asserts a claim based upon unseaworthiness and that the availability of a remedy in Jones Act negligence does not preclude her from proceeding to trial upon both theories.

Each of these contentions will be considered in detail below.

A.

The Jones Act did not pre-empt the entire field of recovery for maritime wrongful death.

Prior to the enactment of, and in areas not served by the Jones Act, the courts, unsatisfied with the bare recital of the incantation that "[d]eath is a composer of strife by the general law of the sea * * *" ¹¹ as a substitute for a solution to the problem of the harsh rule of non-survivability of common law maritime death claims, had established that the general maritime doctrine of unseaworthiness did provide a theory of recovery for wrongful death, both in seamen's suits against their employers and otherwise, by utilizing the state wrongful death statute in whose jurisdiction the death occurred to supply a remedy for death to complement the substantive general maritime doctrine of unseaworthiness. *The Hamilton*, 207 U. S. 398 (1907); *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479 (1923); and see *Cortes v. Baltimore Insular*

¹¹ *Cortes v. Baltimore Insular Line, Inc.*, 287 U. S. 367, 371 (1932). cf. Gilmore & Black, *The Law of Admiralty* 302-303 (1957).

Line, 287 U. S. 367 (1932); *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921).

In this context of existing law, both the Jones Act, which provided a remedy for wrongful death caused by the negligence of the decedent-seaman's employer where the death occurred in state waters, and the Death on the High Seas Act, 41 Stat. 537, et seq., 46 U. S. C. Sections 761-768, which provided a remedy for wrongful death where the death occurred beyond a marine league from state shores, were enacted in 1920 at the same session of Congress. That the latter piece of legislation was intended by the same Congress that enacted the Jones Act to fill a void in wrongful death recovery and to supplement the state wrongful death remedies rather than eliminate them is clearly demonstrated by the express statutory direction in the Death on the High Seas Act (41 Stat. 538, 46 U. S. C. Section 767) "that the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this Act." (Emphasis supplied.) *Western Fuel Co. v. Garcia*, 257 U. S. 233, 243 (1921).¹² One might well conclude, despite a lack of comparable legislative history of the Jones Act itself, that Congress would not have intentionally eliminated state death remedies for unseaworthiness where the decedent was a seaman, while expressly refusing to do so in cases involving non-

¹² And see Mr. Justice Stewart's language in the majority opinion in *The Tungus v. Skovgaard*, 358 U. S. 588, 593 (1959):

"The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.' S. Rep. No. 216, 66th Cong. 1st Sess. 3; H. R. Rep. No. 674, 66th Cong. 2d Sess. 3. The record of debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong. Rec. 4482-4486."

seaman decedents, except that in *Lindgren v. United States*, 281 U. S. 38 (1930), this Court used language which has been interpreted by some to be just such a holding.¹³

Although this was solely a Jones Act death case in which unseaworthiness was never pleaded as a basis for liability, the Court in *Lindgren* took occasion to remark that the Jones Act wrongful death remedy was exclusive and precluded recovery for death by reason of the unseaworthiness of the vessel.

With respect to the question of federal pre-emption of the field of maritime death remedies as between seaman and employer, however, the Court's reasoning was quite explicit.¹⁴ Since the general maritime law provided no re-

¹³ E.g., *Schlichter v. Port Arthur Towing Co.*, 288 F. 2d 801 (5th Cir. 1961) cert. den. 368 U. S. 828 (1961); *Lee v. Pure Oil Co.*, 218 F. 2d 711 (6th Cir. 1955); *Gill v. United States*, 184 F. 2d 49 (2d Cir. 1950); *Robbins v. Esso Shipping Co.*, 190 F. Supp. 880 (S. D. N. Y. 1960); *Bath v. Sargent Line Corp.*, 166 F. Supp. 311 (S. D. N. Y. 1958). But cf. Justice Brennan, concurring in part and dissenting in part on other facts in *The Tungus v. Skovgaard*, 358 U. S. 588, 606-07 (1959):

"The opinion [in *Lindgren v. United States*] dealt primarily with the effect of the Jones Act's wrongful death provision in removing the seaman's right to invoke the remedies of state Death Acts for the identical gravamen of negligence. And, although the libel did not allege unseaworthiness, the Court briefly observed that the Jones Act's death provision would be construed equally as foreclosing a state statute's use on that count." (Emphasis supplied.)

¹⁴ A careful reading of *Lindgren* demonstrates that the reference to federal pre-emption in the Court's opinion was in response only to the libellant's contention that the state wrongful death statute should be applied to supply an alternate remedy to that provided by the Jones Act, where the liability charged was solely negligence, not unseaworthiness. That argument is not advanced in the instant case; however, since the Court of Appeals below failed to make this distinction, but, rather, ruled that the Jones Act pre-empted the field of maritime death remedies, including state remedies for death by unseaworthiness, as well as negligence [Court of Appeals Opinion (R. 42)] petitioner will, in the text which follows, meet this contention.

covery for death by maritime tort, state statutes could be employed to provide relief in the absence of federal legislation on the subject. But when the Jones Act undertook to provide a federal death remedy in claims based upon negligence in the Jones Act, that legislation, "as it covers the entire field of liability for injuries to seamen, * * * is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject."¹⁵

It is petitioner's intention to demonstrate that a finding that the Jones Act pre-empted the entire field of seamen's injuries was unsupportable at its inception in *Lindgren*, and that subsequent interpretations of Congressional intent have made such a finding at best, a historical curiosity—at worst, a hoary blunder of the past perpetuated by *stare decisis* into an unjust rule of the present.

Even though there has been a federal legislative enactment in the field, the doctrine of federal pre-emption cannot be applied to supersede the operation of state statutes in the same area in the absence of a clear manifestation of the intent of Congress to exclude States from exerting their police power in the field.¹⁶ "Its [Congress's] purpose to displace the local law must be definitely expressed." *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 85 (1938). "This is especially the case when public safety and health are concerned." *Maurer v. Hamilton*, 309 U. S. 598, 614 (1940). Moreover, "[t]here is no constitutional rule which compels Congress to occupy the

¹⁵ *Lindgren v. United States*, 281 U. S. 38, 47 (1930).

¹⁶ This principle had been clearly established by this Court before, and followed since *Lindgren* was decided. E.g., *Reid v. Colorado*, 187 U. S. 137, 148 (1902); *Illinois Central R. Co. v. Public Utility Comm.*, 245 U. S. 493, 510 (1918); *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 611 (1926); *Kelly v. Washington*, 302 U. S. 1, 9-10 (1937); *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 85 (1939); *Maurer v. Hamilton*, 309 U. S. 598, 614 (1940); *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1942).

whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field * * * is not forbidden or displaced * * * [T]he exercise by the State of its police power * * * is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' *Kelly v. Washington*, 302 U. S. 1, 10 (1937).

"But the intent to supersede the exercise by the State of its police power * * * is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." *Savage v. Jones*, 225 U. S. 501, 533 (1912). And, moving from the general to the specific facts of this case, "[w]hen the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons * * *. When the State is seeking to protect a vital interest, [this Court has] always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess." *Kelly v. Washington*, 302 U. S. 1, 14 (1937). (Emphasis and bracketed material supplied.)

Four general principles of statutory construction emerge from these cases:

1. If the federal pre-emption doctrine is to be applied, there must be a clear expression of Congressional intention to displace the entire local law by its legislative enactment, *H. P. Welch Co. v. New Hampshire*, *supra*, particularly where public safety is involved, *Maurer v. Hamilton*, *supra*.

2. Such broad intention cannot be implied unless the act of Congress fairly interpreted is actually in conflict with the local law. *Savage v. Jones*, *supra*.

3. When Congress does not occupy an entire field, but only a limited field within the general substantive area, state regulation outside, and not in conflict with, that limited field of federal legislation is not forbidden or displaced, *Kelly v. Washington, supra*.

4. Where the state is seeking to protect a vital interest (such as the prevention of operation of unsafe and unseaworthy vessels in its waterways) the failure of the Congress to fully occupy an entire field should ordinarily not be interpreted to indicate an intention to nullify the state's exercise of its police power in the limited area in which Congress has not legislated. *Kelly v. Washington, supra*.

It is submitted that (1) there was no clear expression of congressional intention by the enactment of the Jones Act to displace the entire local wrongful death act as it was applied to maritime injuries; (2) the Jones Act, fairly interpreted, is not in conflict with the continued operation of the local wrongful death act as it applies to maritime injuries, but merely supplies an *additional* remedy to seamen, and therefore a broad intention to pre-empt the entire field cannot be implied; (3) the Jones Act occupies only a limited field within the general substantive area of remedies for maritime injury and death, and state wrongful death acts, not being in conflict with, but outside that limited field of federal legislation, are not forbidden or displaced; (4) since the state by its enactment of its wrongful death act is, as it is applied to maritime injuries, seeking to protect a vital interest, Congress's failure by the enactment of the Jones Act to fully occupy the entire field of seamen's death remedies should not be interpreted to indicate an intention to nullify the state's exercise of its police power in the limited area in which Congress has not legislated, i.e.,

the death remedy based upon unseaworthiness and the local wrongful death act.

The application of these principles of statutory construction to the Jones Act compels the conclusion that this federal enactment did not, nor was it ever intended by Congress, to cover "the entire field of liability for injuries to seamen,"¹⁷ despite language to the contrary in the *Lindgren* opinion.

For it is evident that the Jones Act was enacted to *enhance* rather than *diminish* the rights of the seaman and his personal representative in the event of his injury or death in the course of his employment. As Justice Brennan, speaking for Chief Justice Warren and Justices Black, Douglas and Clark in *Kernan v. American Dredging Co.*, 355 U. S. 426, 431-432 (1958), has described the background of the enactment of such special industrial legislation as the Federal Employers' Liability Act, and the Jones Act, into which the F. E. L. A. is specifically incorporated:

"It is true that at common law the liability of the master to his servant was founded wholly on tort rules of general applicability and the master was granted the effective defenses of assumption of risk and contributory negligence. This limited liability derived from a public policy, designed to give maximum freedom to infant industrial enterprises, 'to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business.' *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 59. But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks

¹⁷ *Lindgren v. United States*, 281 U. S. 38, 47 (1930).

of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business. For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents. But instead of a detailed statute codifying common law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. *But it is clear that the general congressional intent was to provide liberal recovery for injured workers, Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 508-510, and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers.*" (Emphasis supplied.)

Add to this consideration the fact that "[s]eamen are the wards of admiralty, and the policy of the maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve,"¹⁸ and the position taken by the *Lindgren* Court becomes even less tenable.

Unfortunately, one of the prime tools in ascertaining

¹⁸ *The State of Maryland*, 85 F. 2d 944, 945 (4th Cir. 1936). And see, Jackson, J. dissenting in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 424-425 (1953), pointing out some of the reasons behind the preferential treatment given seamen by the law.

legislative intention is not available. The Jones Act effected a sweeping change in the responsibility of maritime employers to their employees in a brief paragraph with no record of Congressional debate or committee report.¹⁹ But, whatever the reason for such lack of legislative assistance in interpreting this brief but troublesome Congressional act, the sequence of Congressional action in the field of maritime injuries in response to decisional law, considered as a motion picture rather than a still snapshot, sharpens and clarifies the picture of legislative intention.

Prior to 1915, a seaman was "not allowed to recover * * * for the negligence of the master, or any member of the crew * * *." *The Osceola*, 189 U. S. 158, 175 (1903). Nor, by that same authority could he "recover for injuries sustained through the negligence of [a fellow servant]" *Ibid.*

In 1915, Congress passed "[a]n Act to promote the welfare of American seamen in the merchant marine of the United States * * *." 38 Stat. 1164 (1915). In an attempt to alleviate the harsh rule of *The Osceola*, Section 20 provided, in pertinent part:

"That in any suit to recover damages for any injury * * * seamen having command shall not be held to be fellow-servants with those under their authority." 38 Stat. 1185 (1915).

¹⁹ See comment of Gilmore and Black, *The Law of Admiralty*, 281-282 (1957):

"* * * Section 33 [of the Merchant Marine Act of 1920] was a little noticed provision, unrelated to the balance of the statute. As it made its way through committee to the floor of House and Senate, it can hardly have drawn much attention. In due course its constitutionality * * * was upheld by a Supreme Court which might better have struck it down as offensive to the due process clause by reason of impossibly bad drafting."

As Gilmore and Black²⁰ have interpreted this legislative action:

"By those few lines the Congress apparently intended to change the maritime law as stated in *The Osceola* under which an injured seaman could recover more than his maintenance and cure only in an action based on unseaworthiness and could not recover damages for negligence of master or crew in the navigation or management of the ship. At least, if that was not the intention, no one has ever been able to suggest what the intention was. The draftsman of Section 20 had evidently read the [fellow-servant] proposition in *The Osceola* to mean that the reason why seamen could not recover damages for negligence was that all the members of the crew were fellow-servants and consequently the negligence of each was attributed to all, thus barring the action; on that reading, the abolition of the fellow-servant relationship removed the only barrier to recovery and the action could be maintained under maritime law with no need for affirmative Congressional action."

But with the decision in *Chelentis v. Luckenbach S. S. Co., Inc.*, 243 F. 536 (2d Cir. 1917), aff'd 247 U. S. 372 (1918), it became apparent that the bad drafting of the Act of 1915 was to frustrate the Congressional purpose. For, while eliminating one impediment to seamen's recovery for negligence (the fellow-servant doctrine), it had failed to expressly eliminate the other obstacle imposed by *The Osceola* to a seaman's claim for injuries resulting from negligence, i.e., the express prohibition of recovery "for the negligence of the master, or any member of the crew."²¹

²⁰ Gilmore and Black, *The Law of Admiralty* 279-280 (1957).

²¹ *The Osceola*, 189 U. S. 158, 175 (1903).

While there has been some criticism of this technical holding of the Court,²² in fact it stimulated Congress to clarify its intention with respect to the expansion of seamen's right to recover from their employers for active negligence as well as for unseaworthiness of the vessel. For scarcely two years later the Jones Act, incorporating the liability provisions for negligence of the Federal Employers Liability Act, was enacted by Congress.

It is apparent from this recital of events that Congressional activity during this period at all times was directed toward the attempted *expansion* of the theories upon which a seaman's claim against his employer might be brought, expansion to include active negligence as a basis of recovery, not the *elimination* of any remedies that he already had by virtue of the doctrine of unseaworthiness supplemented by local wrongful death acts. For "it is clear that the general congressional intent was to provide liberal recovery for injured workers * * *." *Kernan v. American Dredging Co.*, 355 U. S. 426, 432 (1958).

All of the foregoing indicia of Congressional purpose in enacting the Jones Act were available to the *Lindgren* Court and should have compelled a different conclusion so

²² See comment of Gilmore and Black, *The Law of Admiralty* 281 (1957):

"On the 'how to read cases' level, there can be no quarrel with the Chelentis holding. It is another matter whether Congress should have been made to put on the dunce cap and stand in the corner. If Section 20 had been given its obvious (indeed its only) meaning, the Court would have spared much grief to itself, to the inferior federal judiciary, to the bar and to all parties litigant. The theory of Section 20 had been that, with the removal of the only maritime law bar to recovery, the seaman's action for negligence could proceed on ordinary maritime law principles and there would no longer have been any need to distinguish between unseaworthiness and operating negligence. It must be a matter of regret that the Court refused this simple solution and instead goaded Congress into doing it the hard way."

far as separate unseaworthiness death claims were concerned.

But subsequent case law in the maritime field, with the clarity offered by hindsight, makes yet more dazzlingly lucid what was only somewhat less clear at the time *Lindgren* was decided: that the Jones Act was never intended by Congress to occupy the entire field of seamen's claims for injury and death, but was, rather, intended to plug the gap created by *The Osceola* and provide seamen a remedy against their employers' active negligence *in addition* to the one *The Osceola* gave them for unseaworthiness.

The decisional landscape in the area of survivability of maritime torts has been drastically altered in the thirty-four years since *Lindgren* was decided. The unseaworthiness doctrine has been expanded so that it, and not the Jones Act "has become the principal vehicle for personal injury recovery."²³ Unseaworthiness now includes operating negligence, *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 100 (1944), although the absolute duty imposed upon the shipowner to provide a seaworthy vessel requires no such showing. *Seas. Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

Moreover, "[t]he implacable effect of death on causes of action under the general maritime law has been blunted by recent decisions."²⁴ This Court has employed state statutes to alter the venerated maritime rule that a tort-

²³ Gilmore and Black, *The Law of Admiralty* 315 (1957). And see discussion, pp. 315-316: "... in another ten years the Jones Act will have become a faint and ghostly echo and the law of recovery for maritime injuries will be stated in terms of unseaworthiness alone."

Seven years have passed since this prediction: its accuracy may be tested by the intervening case law.

²⁴ *Burns v. Marine Transport Lines, Inc.*, 207 F. Supp. 276, 280 (S. D. N. Y. 1962).

feasor's liability dies with the tortfeasor. *Just v. Chambers*, 312 U. S. 383, 668 (1941); cf. *Cox v. Roth*, 348 U. S. 207 (1955). An action against the vessel owner based upon the applicable state wrongful death statute and the general maritime doctrine of unseaworthiness may be maintained for death of a *non-seaman* employed aboard a vessel at the time of his death. *The Tungus v. Skovgaard*, 358 U. S. 588 (1959); and see *Holley v. The Manfred Stansfield*, 269 F. 2d 317 (4th Cir. 1959); and *O'Leary v. United States Lines Co.*, 215 F. 2d 708 (1st Cir. 1954), cert. den. 348 U. S. 939 (1955). If the death occurs beyond a marine league from shore a wrongful death action based upon unseaworthiness may be brought under the Death on the High Seas Act. *Kernan v. American Dredging Co.*, 355 U. S. 426 (1958); *McLaughlin v. Blidberg Rothchild Co.*, 167 F. Supp. 714 (S. D. N. Y. 1958); *Chernesino v. Vessel Judith Lee Rose, Inc.*, 211 F. Supp. 36 (D. Mass. 1962) aff'd 317 F. 2d 927 (1st Cir. 1963), cert. den. 375 U. S. 931. By the use of local survival statutes, claims based upon unseaworthiness against a shipowner-employer for *conscious pain and suffering* for injuries accrued prior to the decedent-seamen's death survive. *Holland v. Steag, Inc.*, 143 F. Supp. 203 (D. Mass. 1956), cited with approval in *Kernan v. American Dredging Co.*, 355 U. S. 426, 430, footnote 4 (1958); accord: *McLaughlin v. Blidberg Rothchild Co.*, 167 F. Supp. 714 (S. D. N. Y. 1958); cf. *Just v. Chambers*, 312 U. S. 383 (1941). Claims for maintenance and cure survive the death of the seaman. *Sperbeck v. A. L. Burbank & Co., Inc.*, 190 F. 2d 449 (2nd Cir. 1951). And the intention of this Court to grant similar remedies for substantive rights arising out of the same maritime wrong has been very recently demonstrated. *Fitzgerald v. United States Lines Co.*, 374 U. S. 16 (1963). Nor does the Jones Act provide such an exclusive remedy

to seamen as to preclude recovery for unseaworthiness for a seaman's personal injury if his injuries are not severe enough to cause his death. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 100 (1944); *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

As a consequence of these holdings, there remains but one set of facts in which all general maritime rights are not available to the victim of a maritime tort or his beneficiaries. This results only under circumstances, as in the instant case, where all of the following factors co-exist:

1. The victim must be injured severely enough to be killed.
2. The victim must be a seaman.
3. The victim's death must have occurred in state waters.
4. Suit must have been filed against the victim's employer.
5. The suit must be for wrongful death.

Contemplating the law in this posture as it applies to the concept of federal pre-emption, several immediate questions come to mind. Could Congress have intended the Jones Act to be an exclusive remedy for *death-causing injuries*, but not for *non-fatal injuries*? Did Congress intend by the enactment of the Jones Act to eliminate claims for *wrongful death* based upon unseaworthiness and local remedial statutes, but not claims for decedent's *conscious pain and suffering* prior to death? Did Congress attempt to deal more harshly with *seamen's* claims for injury and death than with *non-seamen's* similar claims, by denying representatives of *seamen* the right to sue under the general maritime doctrine of unseaworthiness, while permitting *non-seamen's* representatives to do so? Can Congress have intended different results in a *seaman's* *wrongful death* claim based upon unseaworthiness,

depending upon whether the death occurred in state waters or a marine league out to sea? The mere posing of these questions indicates that a Congress operating on any rational basis could not and did not have such legislative purposes. As a consequence, the argument that the Jones Act pre-empted the entire field of seamen's remedies for injury and death was, at the time *Lindgren* was decided, and is now, hopelessly indefensible.

Thus, only *Lindgren* now stands in the path of the general tort proposition that all the rights which a claimant had before he died are available in some form to his personal representative upon his death.

This observation is not a compulsive plea for legal symmetry for its own sake. The vast philosophic gulf between *Lindgren* and the other decided cases "indicate[s] something wrong at the beginning or that something has become wrong since then. [It] also show[s] that correction, though in process, is incomplete."²⁵

B.

Interpretation of the statutory language of the Jones Act fails to demonstrate a Congressional finding that unseaworthiness is not available as an alternative maritime death remedy to Jones Act negligence.

After dealing with the subject of federal pre-emption of local laws by the Jones Act,²⁶ the Court in *Lindgren* remarked:

"Nor can the libel be sustained as one to recover indemnity for [decedent's] death under the old maritime rules on the ground that the injuries were occa-

²⁵ *Georgetown College v. Hughes*, 130 F. 2d 810, 812 (D. C. Cir. 1942).

²⁶ In response to a contention not urged here. See footnote 11, *supra*.

sioned by the unseaworthiness of the vessel. * * * [A]n insuperable objection to this suggestion is that the prior maritime law * * * gave no right to recover indemnity for the death of a seaman, although occasioned by the unseaworthiness of the vessel * * *. Apparently for this reason the words 'at his election'—which appear in the first clause of [the Jones Act], relating to the personal right of action of an injured seaman, and * * * gave him, as alternative measures of relief 'an election between the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness'²⁷—were omitted from the second clause of [the Jones Act], relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue." *Lindgren v. United States*, 281 U. S. 38, 47-48 (1930). (Emphasis and bracketed material supplied.)

Thus, the Court, to bolster its contention that the Jones Act recognized that there was no remedy based upon unseaworthiness for a wrongful death claim arising out of a seaman's death in state waters, and by its enactment did not seek to provide any such remedy, urged that the omission of the words "at his election" from the second clause of the Jones Act dealing with *wrongful death claims* was significant in view of the appearance of these words in the first clause dealing with *injury claims*. The Court argued that this statutory language demonstrates that the seaman's representatives had no election between the theories of negligence and unseaworthiness because the unseaworthiness remedy was not available to them at all; only

²⁷ Citing *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 139 (1928).

in the case where a seaman survived his injury was he required to elect between pursuing his claim upon the basis of negligence or unseaworthiness. Therefore, the Court's reasoning was based upon the interpretation that the "election" mentioned in the statute was the seaman's required election between pursuing his claim for negligence or unseaworthiness.²⁸ But with the procedural determination that a seaman was required to plead both grounds of recovery²⁹ and elect between them before reaching the jury,³⁰ it became increasingly difficult, as the factual distinctions between the two grounds gradually melted away,³¹ for seamen-claimants to make a choice which was not "both meaningless and impossible."³² To relieve this cruel choice, the courts interpreted the "election" language of the Jones Act to mean that a seaman was required to elect *procedurally* between a suit in admiralty and a civil action at law, specifically rejecting the meaning assigned to the Jones Act language by the

²⁸ An interpretation derived from language in *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 137-138 (1928) and *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316 (1927). And see *Robinson, Admiralty*, 335 (1939). Note that even under this rule, maintenance and cure was a cumulative remedy to that provided by the Jones Act, and a seaman did not have to elect between them. *Pacific S. S. Co. v. Peterson*, 278 U. S. 130 (1928).

²⁹ *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316 (1927).

³⁰ *Pacific S. S. Co. v. Peterson*, 278 U. S. 130 (1928).

³¹ E.g., see *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325 (1960); *Vickers v. Tumey*, 290 F. 2d 426 (5th Cir. 1961); *Full v. Esso Standard Oil Co.*, 297 F. 2d 411 (5th Cir. 1961) cert. den. 371 U. S. 814 (1962) (recovery for negligent failure to comply with the absolute duty to furnish a seaworthy vessel). And see *Kernan v. American Dredging Co.*, 355 U. S. 426 (1958) (recovery under Jones Act for non-negligent violations of coast-guard regulations). Cf. *Frankfurter, J.*, concurring in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 418 (1954): "• • • [I]t will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness."

³² *Gilmore and Black, The Law of Admiralty* 292 (1957).

Lindgren Court: that a seaman had to elect between substantive grounds of recovery.³³ And when this Court in *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221, 222 (1958), ratified this liberal interpretation of the words, "at his election," the already shaky rationale for the *Lindgren* decision toppled entirely and *Lindgren* became clearly visible as what it has always been: a rule in search of a reason. For while the rationale of *Lindgren* was based upon the view that a seaman was required to "elect" whether to pursue a negligence recovery under the Jones Act or recover under the general maritime doctrine of unseaworthiness, since that case was decided, it has become clear that a seaman need not elect between Jones Act negligence and unseaworthiness, but may proceed to judgment alternatively on both and his verdict will be sustained on appeal if there is no demonstrable prejudicial error as to one of them: *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958).

Nor is the *Lindgren* conclusion any more rehabilitated by history than by the statutory language of the Jones Act. For the Court's contention that "there was no right to indemnity under the prior maritime law which [the personal representative of the decedent-seaman] might have elected to pursue"³⁴ is not historically accurate, quite apart from the Court's attempt to force the statutory

³³ *Branic v. Wheeling Steel Corp.*, 152 F. 2d 887 (3rd Cir. 1946), cert. den. 327 U. S. 801 (1946); *German v. Carnegie-Illinois Steel Corp.*, 156 F. 2d 977 (3rd Cir. 1946); *McCarthy v. American Eastern Corp.*, 175 F. 2d 724, 725 (3rd Cir. 1949) cert. den. 338 U. S. 868 (1949); *Balado v. Lykes Bros. S. S. Co.*, 179 F. 2d 943 (2d Cir. 1950); *Williams v. Tide Water Asso. Oil Co.*, 227 F. 2d 791 (9th Cir. 1955), cert. den. 350 U. S. 960 (1956); Cf. *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1954). And see Gilmore and Black, *The Law of Admiralty*, §§ 6-23 through 6-25 (1957).

³⁴ *Lindgren v. United States*, 281 U. S. 38, 48 (1930).

language into recognition of such a principle. For, as Mr. Justice Stewart has described the development of the case law in this area in *Hess v. United States*, 361 U. S. 314, 318-19 (1960):

"Although admiralty law itself confers no right of action for wrongful death, *The Harrisburg*, 119 U. S. 199, yet 'where death * * * results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam*, for the damages sustained by those to whom such right is given.' *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242. See *The Hamilton*, 207 U. S. 398; *LaBourgogne*, 210 U. S. 95; *Levinson v. Deupree*, 345 U. S. 648; *The Tungus v. Skovgaard*, 358 U. S. 588; *United Pilots Ass'n. v. Ha-lecki*, 358 U. S. 613." (Emphasis supplied.)

And reason compels this result, "or "[I]t would be a strained statement of the effect of *The Harrisburg* [119 U. S. 199 (1886)] to say that there was no duty imposed by the maritime law not to kill persons through breach of the duty of seaworthiness."³⁵

* * * * *

Despite the original invalidity of *Lindgren v. United States* and the body blows dealt *Lindgren* by the subsequent case law, that decision will not disappear *sua sponte* solely as a result of its own logical inconsistencies and lack of harmony with our current social values. For in spite of its infirmities, *Lindgren* is still considered to be compelling precedent by the Court of Appeals below³⁶ and

³⁵ Brennan, J., concurring in part and dissenting in part in *The Tungus v. Skovgaard*, 358 U. S. 588, 601 (1959).

³⁶ Court of Appeals opinion (R. 46).

other inferior courts.²⁷ Many of these courts have followed *Lindgren* protestingly, haltingly, and crying out against its logical barrenness and basic injustice. E.g., *Fall v. Esso Standard Oil Co.*, 297 F. 2d 411, 417 (5th Cir. 1961):

"We feel compelled to hold that the general maritime law, unaided by the Jones Act, *anomalously, archaically, unnecessarily* in terms of general principles, gives [plaintiff] no right of action." (Emphasis supplied.)

And see *Mortenson v. Pacific Far East Line, Inc.*, 148 F. Supp. 71, 73 (N. D. Cal. 1956):

"If this disparity in actions for personal injuries and wrongful death is deplorable, the remedy is not for this Court."

And in *Gill v. United States*, 184 F. 2d 49, 57 (2nd Cir. 1950), Judge Learned Hand attacked the logical basis of the *Lindgren* decision with unassailable force:

"Is a vessel owner liable for a seaman's * * * death within the territorial waters of a state, when it is caused by the unseaworthiness of the vessel? I have no doubt that the death was owing to the respondent's 'wrongful act, neglect or default,' as the New Jersey Act uses those words; but in *Lindgren v. United States*, 281 U. S. 38 * * *, the Supreme Court held that the Jones Act, 46 U. S. C. A. § 688, superseded a state statute creating such a claim * * *. Since then, the Court has indeed decided that a seaman may recover for injuries suffered from the ship's unseaworthiness, *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 100 * * *, and the same is true of longshoremen, *Seas Shipping Co. v. Sietacki*, 328 U. S. 85 * * *.

²⁷ *Schlichter v. Port Arthur Towing Co.*, 288 F. 2d 801 (5th Cir. 1961); *Robbins v. Esso Shipping Co.*, 190 F. Supp. 880 (S. D. N. Y. 1960); *Bath v. Sargent Line Corp.*, 166 F. Supp. 311 (S. D. N. Y. 1958); *Lee v. Pure Oil Co.*, 218 F. 2d 711 (6th Cir. 1955); *Gill v. United States*, 184 F. 2d 49 (2nd Cir. 1950).

I find it hard to understand why the rationale of *Lindgren v. United States*, *supra*, ought not to have forbidden recovery in either of these instances. If the Jones Act 'covers the entire field of liability for injuries to seamen' * * * and 'is paramount and exclusive,' why does it not supersede injuries arising from unseaworthiness which do not result in death, as well as those which do? * * * Yet I must own to the greatest doubt whether the Court would today so hold." (Emphasis supplied.)

To this plea for a rational rule to administer, this Court owes a clear response. For this Court has "a most extensive responsibility of fashioning rules of substantive law in maritime cases * * *. This responsibility places on this Court the duty of assuring that the product of the effort be coherent and rational."³⁸

"When it appears that a challenged doctrine has been uncritically accepted as a matter of course by the inertia of repetition * * * the Court owes it to the demands of reason, on which judicial law-making power ultimately rests for its authority, to examine its foundations and validity" and, having done so, to remove *Lindgren* from the judicial landscape by expressly overruling it.

C.

Plaintiff's amended complaint asserts a claim based on unseaworthiness for which she is entitled to proceed to trial.

There remains for consideration the question of whether petitioner's amended complaint asserts a claim based upon unseaworthiness sufficient to raise the ques-

³⁸ Brennan, J., concurring in part and dissenting in part in *The Tungus v. Skovgaard*, 358 U. S. 588, 611 (1959).

³⁹ Frankfurter, J., dissenting in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, 550 (1959).

tions considered in arguments I(A) and I(B), *supra*, pp. 10-30.

Both of the courts below placed great emphasis upon their finding that "all of the allegations of the complaint * * * constitute assertions of negligence,"⁴⁰ apparently to support their conclusion that petitioner's sole relief is under the Jones Act. Petitioner's position is that her amended complaint adequately presents and preserves for review a wrongful death claim based upon unseaworthiness, and that her reliance, in the alternative, upon allegations of negligence under the Jones Act does not divest her of her general maritime rights, nor prevent her from going to trial on both grounds.

Petitioner's amended complaint clearly establishes her claim based upon unseaworthiness for wrongful death. Apart from other allegations, her reliance upon "the General Maritime Law [and] the Ohio Wrongful Death Act, Ohio Revised Code, Sec. 2125.01 et seq." is clearly stated in the very first paragraph. (R. 1.) Moreover, paragraph V of her amended complaint makes her legal position abundantly clear:

"The failure of the defendant to provide gear and equipment to permit safe access to its vessel from a slippery, dangerous and unsafe dock and the defendant's failure to equip the ship with devices to eliminate the necessity of boarding the vessel by the ladder and tackle arrangement used, rendered the vessel unseaworthy: such unseaworthiness proximately caused the fall of the plaintiff's decedent from the dock and his resultant death by drowning."

Further, allegations of negligence (h), (j), (k), (l), (n), (q) and (r) in paragraph IV (R. 2-4) are clearly allega-

⁴⁰ Court of Appeals opinion (R. 48). And see Memorandum on Motion to Strike by Jones, J. in the federal district court (R. 15).

tions of negligent failure to provide the vessel with gear and equipment, without which the vessel would be unseaworthy.

Petitioner has pleaded respondent's failure to provide adequate equipment and appliances appurtenant to the vessel to permit reasonably safe access to the ship from shore. These allegations fall squarely within the expanded concept of unseaworthiness provided by this Court's recent decisions. Whether a condition of unseaworthiness of a vessel is brought about by operating negligence, *Mah-nich v. Southern S. S. Co.*, 321 U. S. 96 (1944) or no negligence at all, *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), recovery on that ground is not precluded. Further, where the unseaworthiness of the vessel causes injury to an individual on the dock, rather than aboard ship, he may recover on that ground from the vessel owner. *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206 (1963).⁴¹

Moreover, failure to provide an adequate ladder as a safe means of ingress and egress to the vessel has been held to constitute unseaworthiness. *Buch v. United States*, 122 F. Supp. 25 (S. D. N. Y. 1954) modified and aff'd 220 F. 2d 165 (2nd Cir. 1955).

Furthermore, not only *may* a seaman or his representatives join in the same action separate counts of Jones Act negligence and unseaworthiness and proceed to trial without electing between them, *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958), but if he is to preserve his right to litigate on both grounds, he *must* do so, *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316 (1927).

⁴¹ And see Frankfurter, J., concurring in *Pope & Talbot v. Hawn*, 346 U. S. 406, 418 (1954): " * * * it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness."

In view of these holdings, the reasoning of the Court of Appeals becomes, to say the least, obscure, with respect to the following language:

"It is to be noted that all of the allegations of the complaint constitute assertions of negligence * * *. Whether the negligence was failure to provide safe access to the ship for plaintiff's decedent, or whether the negligence was a breach of defendant's duty to provide a seaworthy ship, the action is based upon negligence and proximate cause, and on the proof thereof, plaintiff would be entitled to a judgment."

(R. 48.) (Emphasis supplied.)

Quite apart from the important differences in beneficiaries dependent upon whether petitioner's claim is grounded upon negligence or unseaworthiness, it would be a harsh application of the rule indeed to hold, as the language of the Court of Appeals would suggest, that petitioner, who would have been barred from pursuing her Jones Act remedy had she omitted it from her complaint, is now barred from pursuing her unseaworthiness remedy because she failed to omit her Jones Act allegations.

The issue has been properly preserved for review by this Court.

To the plea of the Court of Appeals below that "if *Lindgren v. United States* * * * is to be overruled, the landmarks must be plainer to see," this Court ought to respond by providing the clearly visible landmark which that court seeks: a clear rejection of *Lindgren*, and an explicit statement that, in an action against his employer for the wrongful death of a seaman in state waters, the wrongful death statute of the state may be used to provide an effective remedy for the violation of the federal maritime

duty to keep vessels seaworthy,⁴² notwithstanding any other remedies for negligence under the Jones Act which may be available to his beneficiaries.

Such a result is clearly in the public interest, for so long as seamen are employed extensively in the hazardous industry of transportation by ship, so long as maritime torts occur which cause fatal injuries, so many persons will this Court's ruling affect and so far will the shadow of this Court's ruling extend.

II.

THE CLASSES OF BENEFICIARIES NAMED IN THE JONES ACT ARE CUMULATIVE, NOT EXCLUSIVE.

The second question raised is whether the classes of beneficiaries named in the Jones Act are mutually exclusive so that, in a wrongful death action, the existence of a beneficiary in one such class precludes recovery by persons in the other class.

It is true, of course, that if petitioner is successful in her contention under [I], *supra*, that the right to claim under general maritime law and the Ohio Wrongful Death Act is available to her, as a practical matter, this question would become less important, because all of the beneficiaries for whom petitioner originally sued would be

⁴² In overruling *Lindgren*, the determination of how much of the local wrongful death statute and the extent to which the law of the state in whose waters the death occurred controls need not be here considered because of the clear manner in which the issue has been raised by the pleadings. Unless the Court would prefer to explain or reconcile the decisions on this subject in *Southern Pacific R. R. v. Jensen*, 244 U. S. 205 (1917); *The Tungus v. Skovgaard*, 358 U. S. 588 (1959); *United Pilots Ass'n v. Halecki*, 358 U. S. 613 (1959); *Hess v. United States*, 361 U. S. 314 (1960); *Goett v. Union Carbide Corp.*, 361 U. S. 340, 347 (1960) (Whittaker, J., dissenting) and *Kossick v. United Fruit Co.*, 365 U. S. 731 (1961), in order to provide guidance in the trial of this cause, this task will be left for another day.

restored to the suit by reason of this Court's reversal of the order of the court below. Clearly, if the Ohio Wrongful Death Act (R. C. § 2125.01, et seq.), in conjunction with the doctrine of unseaworthiness, is applicable to the instant action, dependent sisters and brothers as well as a dependent mother may participate as beneficiaries in the same wrongful death action. Section 2125.02, Ohio Revised Code, provides that a wrongful death action "shall be for the exclusive benefit of the surviving spouse, the children and *other next of kin of the decedent*". (emphasis supplied), and this language has been interpreted broadly to include brothers and sisters as well as parents, when both classes of kin are in existence, among the beneficiaries of a single wrongful death action. *Karr v. Sixt*, 146 Ohio St. 527 (1946).

It has been demonstrated that where each of several theories of liability permits recovery for a different class of beneficiaries, recovery by one class upon one theory does not bar the other class from an independent recovery on the other. For example, in *The Four Sisters*, 75 F. Supp. 399 (D. Mass. 1947), the decedent-seaman was unmarried, had no children and was survived by a father, a brother and a sister. The father-administrator brought suit under the Jones Act for the benefit of decedent's dependent sister and himself. After the suit as to the sister was dismissed by the trial court on the ground that the survival of the father precluded Jones Act recovery for the sister because of the mutually exclusive classes of beneficiaries, provided by the FELA, the father recovered a Jones Act verdict. After this judgment was satisfied, he brought suit, as administrator, in admiralty for the sister under the Death on the High Seas Act. Held: the sister's action was not barred by the prior Jones Act recovery of the father. This decision indicates that where, as here,

different theories of liability establish the right of different classes of beneficiaries to recover, recovery may be had by one class on one theory and by the other class on another.

Any procedural impediment to joining both classes of beneficiaries and both theories of liability in a single action has been removed by *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958), decided since *The Four Sisters, supra*, which permits the joinder of several theories in one action, with no requirement that the plaintiff elect between them. See *Whitaker v. Blidberg-Rothchild Co.*, 195 F. Supp. 420, *aff'd* 296 F. 2d 554 (4th Cir. 1961), which permitted a dependent mother to recover for her decedent's death under the Death on the High Seas Act, although in the same action she was denied recovery under the Jones Act because of the survival of a non-dependent daughter of the decedent.

It follows that in the case at bar proof of the petitioner's allegations will permit recovery under the Jones Act by the petitioner as the decedent's mother, and under the doctrine of unseaworthiness to the other named beneficiaries, the decedent's siblings.

But even if this Court should rule against petitioner's claim in [1], *supra*, petitioner contends that under the Jones Act alone, all of the dependent sisters and brother, as well as the mother of the decedent are entitled to participate in the fund created by recovery for their decedent's wrongful death. It is expressly provided by the F. E. L. A.,⁴³ incorporated by reference into the Jones Act, that in a wrongful death action under the Act, the decedent's personal representative may recover "for the benefit of the surviving widow or husband and children of such

⁴³ Federal Employers' Liability Act, 45 U. S. C. § 51 et seq.

employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee * * * (pp. 42-43, *infra*). (Emphasis supplied.)

It is true that in *C. B. & Q. R. Co. v. Wells-Dickey Trust Co., Admr.*, 275 U. S. 161 (1927) this Court interpreted this language narrowly as providing exclusive classes of beneficiaries. But in *Poff v. Pennsylvania R. Co.*, 327 U. S. 399 (1946), this language was interpreted broadly to provide, rather than to defeat, recovery for beneficiaries. The liberal purposes of the Act require such broad interpretation of this as well as other language in the Jones Act and F. E. L. A.

Although the court in *Wells-Dickey*, without analysis, found the express language of the F. E. L. A. to clearly demonstrate the Congressional intent to provide exclusive compartments of beneficiaries, the holding is not merely a *pro forma* reading of the statute; the result that it reached required judicial interpretation of a greater degree as well—judicial interpretation which might well have reached a contrary result, in view of the liberal construction required of the F. E. L. A. The use of the connective "and" between the classes of beneficiaries rather than "or" suggests strongly that Congress intended the classes to be cumulative rather than exclusive. The words "if none" have meaning under this construction of the statutory language by inserting an elliptical "even" before those words, demonstrating that all subsequently named classes participate as beneficiaries, "even if none" exist in the prior class. As to the question of how a recovery shall be apportioned among such beneficiaries, the probate machinery of each state (which adequately confers status to sue upon a personal representative under the same federal acts) provides an equitable and adequate solution.

This statutory construction is at least as valid as that which the Court in *Wells-Dickey* applied, and has the additional advantage of conforming to the spirit of the F. E. L. A. and Jones Act and the liberal construction to which these Acts are entitled.

This Court is urged to re-examine *Wells-Dickey* in this light to give effect to the purposes of this social legislation.

III.

A CLAIM FOR CONSCIOUS PAIN AND SUFFERING SURVIVES DESPITE THE CLOSE PROXIMITY OF THE INJURY AND DEATH.

The third question raised is whether a claim for conscious pain and suffering survives the death of a seaman, where the period of pain and suffering for which compensation is claimed is short and immediately preceded his death by drowning.

It must be noted that, in addition to her claim for the decedent's wrongful death (Paragraph VII, amended complaint, R. 5) petitioner also seeks recovery for *conscious pain and suffering of the decedent while he was alive*. (Paragraph VI, amended complaint, R. 5.)

Even if Respondent's contention that unseaworthiness is not an available theory of liability in actions for *wrongful death* were correct (which petitioner denies, see argument [I] above, pp. 7-34) the language in her complaint which refers to the general maritime law, the doctrine of unseaworthiness and the Ohio Survival Statute, Ohio Revised Code, Sec. 2305.21 et seq., should be retained because she has, in the same action, sought relief, in addition, for *conscious pain and suffering*.

Holland v. Steag, 143 F. Supp. 203 (D. Mass. 1956), so holds. In that case the court held that a state survival

statute "appears effective * * * to bring about a survival of the seaman's right under maritime law to recover for personal injuries caused by the unseaworthiness of the vessel." 143 F. Supp. 203, 206.

And this Court has cited *Holland* with approval in *Kernan v. American Dredging Co.*, 355 U. S. 426, 430, footnote 4 (1958). See also *Just v. Chambers*, 312 U. S. 383 (1941), in which it was held that a state survival statute would permit the survival of a maritime action for personal injuries after the death of the tortfeasor, even though, under the maritime law alone, there would have been no such survival.

But the court below concluded that "there would be no substantial basis, in this case, for a separate estimate of pain and suffering," even "[a]ssuming * * * that a right of action were to pass to decedent's relatives, under the Ohio Wrongful Death Act," ⁴⁴ based upon the language in *The Corsair*, 145 U. S. 335, 348 (1892), that where suffering is brief and "substantially contemporaneous" with death, the decedent's "fright for a few minutes is too unsubstantial a basis for a separate estimation of damage." ⁴⁵ The language of the amended complaint which the court below dismissed in such summary manner referred to "severe personal injuries which caused [decedent] excruciating pain and mental anguish prior to his death" ⁴⁶ and sought compensation therefor.

Since the decision of *The Corsair*, 145 U. S. 335 (1892), many courts have sustained separate awards for conscious pain and suffering where the interval between injury and death was extremely short. E.g., *St. Louis, I. M. & S. R. Co. v. Stamps*, 84 Ark. 241, 104 S. W. 1114

⁴⁴ Court of Appeals Opinion (R. 35).

⁴⁵ Court of Appeals Opinion (R. 36).

⁴⁶ R. 5.

(1907) (verdict of damages for pain and suffering sustained where decedent fell from bridge and drowned); *Boutlier v. City of Malden*, 226 Mass. 479, 116 N. E. 251 (1917) (decedent exclaimed and rolled on ground before death after electrocution; held: conscious pain action sustained); *Campbell v. Romanos*, 191 N. E. 2d 764, 768 (Mass. 1963) (decedent died of burns while running from fire; held: conscious pain and suffering action justified); *Brown v. Oestman*, 362 Mich. 614, 107 N. W. 2d 837 (1961) (proof of flow of blood after decedent was struck on head held sufficient to sustain action for conscious pain and suffering); *Sharpe v. Munoz*, 256 S. W. 2d 890, 82-93 (Tex. Civ. App. 1953) (child died of burns in seconds; although remittitur of part of conscious pain and suffering award was ordered, principle of recovery for conscious pain and suffering where death was almost instantaneous approved). See also *Chicago R. I. & P. R. Co. v. White*, 112 Ark. 607, 165 S. W. 627 (1914); *Davis v. Bolstad*, 295 S. W. 2d 941, 955 (Tex. Civ. App. 1956); *Keowen v. Amite Sand & Gravel Co.*, 4 So. 2d 79 (La. App. 1941).

In the light of this judicial experience, this Court is urged to reconsider the harsh view announced in *The Corsair*.

If, at trial, petitioner is unable to sustain her burden of proof on this issue, her claim for compensation for this portion of her suit should fail for that reason. But she should have the opportunity to make such proof of this contention as she can muster without a prejudgment at the pleading stage that her proof must fail. If the language in *The Corsair* is no longer the position of this Court in view of the developments over the past half-century of tort law with reference to compensability of claims for pain accompanied by mental anguish since that decision, this case provides an opportunity to say so.

The imperatives of orderly and symmetrical treatment of maritime claims arising out of the same incident⁴⁷ require that this Court emancipate itself and the inferior federal courts from the hoary rule of *The Corsair*.

CONCLUSION.

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

JACK G. DAY,

BERNARD A. BERKMAN,

Counsel for Petitioner.

BERNARD A. BERKMAN,

Of Counsel.

⁴⁷ E.g., *Fitzgerald v. United States Lines Co.*, 374 U. S. 16 (1963).

APPENDIX A.

MERCHANT MARINE ACT OF 1920, SEC. 33.

46 U. S. C. § 688. *Recovery for Injury to or Death of a Seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

FEDERAL EMPLOYERS' LIABILITY ACT.

45 U. S. C. § 51. *Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence; Definition of Employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her

personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

OHIO WRONGFUL DEATH ACT.

Ohio Revised Code. § 2125.01. *Action for Wrongful Death.*

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the corporation which or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it murder in the first or second degree, or manslaughter. When the action is against such administrator or executor the damages recovered shall be a valid claim against the estate of such deceased person.

When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance thereof.

Ohio Revised Code. § 2125.02. Proceedings.

An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent. The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought. Except as otherwise provided by law, every such action must be commenced within two years after the death of such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment may, at any time before or after the commencement of the suit, settle with the defendant the amount to be paid.

OHIO SURVIVAL STATUTE.

Ohio Revised Code. § 2305.21. *Survival of Actions.*

In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.